IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-6909

GARY MANESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Offender Rehabilitation,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to United States Supreme Court Rules 24 and 40(3) and for the purpose of this brief only, the respondent respectfully accepts those portions of petitioners' petition entitled "Opinion Below", "Jurisdiction", "Question Presented", "Constitutional and Statutory Provisions Involved", and "Statement of the Case" as substantially true and correct.

ARGUMENT

THE INSTANT PETITION SHOULD BE DENIED BECAUSE THE RULE OF LAW ANNOUNCED IN MANESS v.WAINWRIGHT, 512 F.2d 88 (5th CIR. 1975) DOES NOT CONFLICT WITH THE RULE OF LAW ANNOUNCED EITHER IN CHAMBERS v. MISSISSIPPI, 410 U.S. 284 (1973) OR UNITED STATES v. TORRES, 477 F.2d 922 (9th CIR. 1973) AND BECAUSE THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW CONCLUSIONS OF A LOWER CIRCUIT COURT THAT DEPEND UPON APPRECIATION OF CIRCUMSTANCES WHICH ADMIT OF DIFFERENT INTERPRETATIONS.

Petitioner asks this Court to review the decision in Manness v. Wainwright, 512 F.2d 88 (5th Cir. 1975); rehearing en banc granted, 519 F.2d 1085 (5th Cir. 1975); rehearing en banc vacated 528 F.2d 1381 (5th Cir. 1976); rehearing denied 528 F.2d 1382 (5th Cir. 1976). There is no assertion by petitioner that this Court should grant its writ of certiorari in the instant case to decide a novel and important question of federal constitutional law which has not heretofore been decided by this Court. It is clear that this Court has already addressed the legal issue involved in Maness when it decided Chambers v. Mississippi, 410 U.S. 284 (1973) and that the lower appellate court merely applied the holding of Chambers to that lower court's interpretation of the facts in Maness to reach its result. Compare National City Bank of New York v. Republic of China, 348 U.S. 356 (1955). Instead, petitioner claims entitlement to a writ on the theory that Maness conflicts with Chambers and United States v. Torres, 477 F.2d 922 (9th Cir. 1973).

It is established that this Court will grant a writ of certiorari where there is a conflict between the rule of law announced in the decision sought to be reviewed and a rule of law announced in the decision with which conflict is alleged. See e.g. United States v. Giordano, 416 U.S. 505 (1974) (conflict with another circuit); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (conflict with other circuits); Hawkins v. United States, 358 U.S. 74 (1958) (conflict with other circuits); United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958) (conflict with prior Supreme Court decision); Heflin v. United States, 358 U.S. 415 (1959) (conflict with prior Supreme Court decision); Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) (conflict with prior Supreme Court decision and with other circuits); California v. Taylor, 353 U.S. 553 (1957) (conflict between federal circuit court and state supreme court). The rule of law expressed in Maness does not conflict either with the rule of law announced in United States v. Torres, 477 F.2d 922 (9th Cir. 1973) or the rule of law announced in Chambers v. Mississippi, 410 U.S. 284 (1973), in contrast to what petitioner would have this Court believe.

A reading of Torres shows that the holding of Torres was that the evidentiary rule of impeaching one's own witness was, as a matter of federal evidentiary law, nolonger the law in the Ninth Circuit. Chambers was cited in Torres merely as support

for the Ninth Circuit's decision to change its own federal evidentiary law. Torres did not hold that the evidentiary rule in question was impermissible as a matter of federal constitutional law. In Dutton v. Evans, 400 U.S. 74 (1970) this Court stated that a state's evidentiary rule of law does not violate the federal constitution merely because it does not exactly coincide with the same evidentiary rule which is utilized in the federal courts. Moreover, in Murphy v. Florida, 421 U.S. 794 (1975) this Court stated that a decision of this Court expressly rendered in exercise of its supervisory powers is not a constitutional ruling which is binding on the states. Given the distinction between a constitutional decision and an evidentiary decision and also given the recognized right of two sovereigns to maintain diametrically opposed evidentiary rules of law, the non-existance of a real and vital conflict between Torres and Maness becomes obvious. The appearance of conflict loses its reality. Since Maness did not hold Floirda's "voucher" rule unconstitutional but did address whether petitioner was denied due process by application of Florida's evidentiary law to the facts of his case, the rule of law in Maness is not in conflict with the federal evidentiary rule announced in Torres, which latter rule was not based on constitutional grounds.

The rule of law expressed in Chambers likewise does not conflict with the rule of law announced in Maness. In Chambers this Court expressed both what was and what was not its holding.

> In this case, petitioner's request to cross-examine McDonald was denied on the basis of a Mississippi common-law rule that a party may not impeach his own witness. ***
>
> ****
> ****
> ***The "voucher" rule, as applied in this case, plainly interferred with Chambers' right to defend against the State's charges.
>
> We need not decide, however, whether this error alone would occassion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses. ***The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay.
>
> ****
> ****
> ****
>
> ***In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminuation in respect, traditionally accorded to the States in the establment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts of this case the rulings of the trial court deprived Chambers of a fair trial.
>
> Chambers v. Mississippi, supra at 295-303.

This Court expressly stated its holding in Chambers. There is no room for ambiguity. Chambers did not hold all "voucher" rules unconstitutional. Chambers announced no new rule of constitutional law. All that Chambers held was that due process can be denied by a combination of evidentiary rulings which are improper when applied to the facts of a particular case. Chambers'

rule of law is no more than this. Maness reveals that the Fifth Circuit recognized, accepted and adopted the express holding of Chambers. Consequently, as a matter of logic it follows that the rule of law announced in Maness cannot be in conflict with the rule of law announced in Chambers.

The petition sub judice bespeaks the real theory or strategy upon which petitioner relies in his effort to obtain this Court's writ. Petitioner presents a detailed recitation of the facts involved in this case as he construes them. Petitioner stresses factual findings of the lower district court. Petitioner stresses factual findings and conclusions derived therefrom which were made by the lower circuit court and the "dramatic contrast" in the findings of the dissenting opinion. Petitioner points out that in his petition for rehearing, he stressed his disagreement with the factual findings and conclusions derived therefrom that appeared in the Maness opinion. As footnote one(1) of the Maness opinion reveals, letters of Linda Maness, which were proffered at the state trial were not submitted to the lower district court. The instant petition expressly notes that after the Maness opinion was rendered, petitioner filed a motion for leave to supplement the record with many of the alleged letters of Linda Maness -- which motion petitioner admits was denied. Petitioner conspicuously places this motion in the appendix to his petition for this Court to peruse the selected excerpts from these letters in order to buttress his factual assertions. In light of this stressing of facts, petitioner inadvertently tips his hand when he states in his petition "Although the facts and points of law in the two cases are similar, the Fifth Circuit reached a result diametrically opposed to that reached by this Court in Chambers.", (Petition at page 14), and "The opinion further misinterprets controlling facts in the Maness case crucial to a just determination of petitioner's claim.", (Petition at page 16). What then is petitioner's real strategy? It is simply to hope that this Court will view his factual assertions, disagree with the lower court's factual interpretations and grant the requested writ.

In reply to this strategy respondent notes certain principles of law which this Court has in its wisdom established and followed. Where conclusions of a court of appeals depend upon appreciation of circumstances which admit of different interpretations, the Supreme Court will not interfere. Federal Trade Comm'n v. Standard Oil Co., 355 U.S. 396 (1958); Nat'l Labor Relations Bd. v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543 (1927); see Appalachian Power Co. v. American Institute of Certified Public Accountants, __U.S.__, 80 S.Ct. 16 (1959) (decision of Brennan, J. acting as Circuit Justice in denying request for stay of lower court's mandate). The Supreme Court does not grant certiorari to circuit courts of appeal to review evidence and to discuss specific facts. United States v. Johnston, 268 U.S. 220 (1925). In light of this law the concurring opinion of Chief Judge Brown in the en banc decision of the Fifth Circuit to vacate its prior order granting rehearing en banc says much.

> While I concur in the order vacating the en banc largely because the overwhelming majority thought the case was essentially a factual one, on the merits of the case I register my concurrence in Judge Clark's dissenting opinion for the panel and now that of Judge Goldberg.
>
> Maness v. Wainwright, 528 F.2d 1381, 1382 (5th Cir. 1976) (concurring opinion.)

In light of the foregoing arguments, this Court's statement in Layne & Bowler Corp. v. Western Wells Works, Inc., 261 U.S. 387 (1923) is especially pertinent in resolving whether this Court should issue a writ of certiorari to the instant

> It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the ninth, thirteenth, and twetieth claims, that they were really in harmony and not in conflict and that there was no gound for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the comsideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head.
>
> Id. at 392-393.

The instant petition should be denied.

CONCLUSION

For the foregoing reasons the respondent, LOUIE L. WAINWRIGHT, respectfully requests this Honorable Court to deny the instant petition for a writ of certiorari.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, ARTHUR JOEL BERGER, Assistant Attorney General, State of Florida, first being duly sworn according to law, to depose and say:

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was furnished by mail to each of the following: BENNETT H. BRUMMER, ESQ., Assistant Public Defender, 800 Metro Justice Building, 1351 N.W. 12th Street, Miami, Florida 33125 and ALBERT G. CARUANA, ESQ., American Civil Liberties Union , c/o Greenberg, Traurig, Hoffman, Lipoff and Quentel, P.A., 1401 Brickell Avenue, Miami, Florida 33131; this 16 day of September, 1976.

Arthur Joel Berger

ARTHUR JOEL BERGER
Assistant Attorney General

SWORN TO and SUBSCRIBED before me at Miami, Dade County, Florida, this 16 day of September, 1976.

Notary Public

NOTARY PUBLIC
State of Florida
My Commission Expires: September 16, 1977